HOO CHEE KEONG

v.

PP

HIGH COURT MALAYA, MELAKA
KN SEGARA J
[CRIMINAL APPEAL NO: 42-17-1998]
6 JANUARY 2000

CRIMINAL LAW: *Penal Code - Section 474 - Having possession of forged valuable security with intent to use as genuine - Proof - Accused in possession of credit cards with different names - Whether credit cards "valuable security" - Whether purported to give authority "to deliver any movable property" to some person - Whether accused knew that documents were counterfeits - Whether intended to use them as genuine - Penal Code, ss. 29, 466, 467, 474 - Criminal Procedure Code, s. 422*

CRIMINAL PROCEDURE: *Sentence - Adequacy - Conviction under s. 474 Penal Code - Having possession of forged valuable security with intent to use as genuine - First offender - Appropriate sentence*

The accused was charged with offences under s. 474 Penal Code when forged Mastercard credit cards ('P3 and P4') and several sales slips in respect of transactions carried out with credit cards ('P6A-D') were found on his person. The accused did not dispute that P3 and P4 were counterfeits, but contended that he had no knowledge of that, and so, did not have the intention of using the forged credit cards "fraudulently or dishonestly as genuine", as charged. The accused also denied that P6A-D were found in his possession, but made no effort to rebut the evidence of possession adduced by the prosecution. The learned Sessions Court judge, relying *inter alia* on the principles enunciated in *Mat v. Public Prosecutor*, ruled that the accused had not cast any doubt on the prosecution's case, and in the event convicted the accused and sentenced him to six years imprisonment and seven years imprisonment respectively. The accused has since appealed.

Held:

[1] The description of the credit cards as a valuable security in the charges does not render the charges defective or null and void in the event that the said credit cards are in fact and in law not a valuable security within the definition of s. 30 Penal Code, provided that they came within the description of any documents listed in ss. 466 or 467 Penal Code. What is important for a charge under s. 474 is that the document, which is the subject matter of the charge, is a document within the definition of s. 29 Penal Code and is also any one of the several documents listed in ss. 466 or 467 thereof.

[2] P3 and P4, which were forged but made to resemble the genuine, fall within the definition of "document" under s. 29 Penal Code. P3 and P4 also give authority to a merchant who has an agreement with an acquiring bank to deliver any movable property or render any services to the holder of the said cards. That being so, even if P3 and P4 are not deemed valuable security, they are documents which purport to give authority "to deliver any movable property" to some person, and are therefore one of the many types of documents described and alluded to in s. 467 Penal Code.

[3] Failure to describe the documents accurately in the charge and/or failure to precisely identify which of the several documents listed in ss. 466 or 467 Penal Code the prosecution is relying on for a charge under s. 474 Penal Code, in any case, is a mere irregularity curable under s. 422 of the Criminal Procedure Code.

[4] Proof of possession of the credit cards with different names by the accused readily leads to the inference that the accused had knowledge that they were forged and had the intention to use them as genuine. The accused's defence that he had found the credit cards in the car and took them because they were important does not and cannot create any doubt in the prosecution's case.

[5] The accused's denial that P6A – D and P7A were found in his possession was a blatant lie. The discovery of the forged credits cards and other incriminating exhibits from the person of the accused is not only supported by the testimony of SP4, but also corroborated by the search list, as well as by the accused's failure to challenge or rebut the relevant evidence on possession and discovery.

[6] The learned Sessions Court judge has come to the correct conclusion in finding the accused guilty on the two charges upon which the accused was called upon to enter his defence. The learned Sessions Court Judge has also applied the correct principles enunciated in *Mat v. Public Prosecutor* in evaluating the defence, and has given his reasons as to why he did not believe the accused or why the defence has not cast any doubt on the prosecution's case.

[7] Whilst the offence committed by the accused is a serious offence, consideration must be given to the fact that he is a first offender, that no violence was used and that no heavy financial loss has been incurred by the use or intended use of the credit cards. The sentence imposed by the court below is set aside and substituted with three years imprisonment on each of the two charges.

[Appeal dismissed; conviction upheld; sentence varied accordingly.]

Case(s) referred to:
Mat v. PP [1963] 29 MLJ 263 ***(refd)***
PP v. Hoo Chee Keong [1997] 2 CLJ Supp 357 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 422
Penal Code, ss. 29, 30, 466, 467, 474

For the appellant - Hillary D'Cruz; M/s Low & Lee
For the prosecution - Anselm Fernandis DPP

Reported by WA Sharif

JUDGMENT

KN Segara J:

The appellant (hereinafter referred to as "the accused") was charged in the Sessions Court, Melaka with three counts under s. 474 of the Penal Code for having in his possession on 4 November 1994 at about 12.40am three credit cards, namely:

1) Citibank Preferred Mastercard No. 5279 7815 2023 5001 under the name of PT. Poon (exh. P3);

2) National Westminister Bank Access Mastercard No. 5400 6800 3003 0831 under the name of Mr. Tan Soon Meng (exh. P4); and

3) Citibank Classic Mastercard No. 5420 3272 0200 3180 under the name of Wong Kah Meng (exh. P5),

knowing the same to be forged and that the same shall be fraudulently or dishonestly used as genuine.

The case was first heard before the learned Sessions Court judge Tuan Mohd Zaki bin Abdul Wahab. The learned Sessions Court judge acquitted the accused on all the three counts at the end of the case for the prosecution. The prosecution then appealed against the decision. The appeal was heard by Tuan Augustine Paul JC (as he then was). The learned Judicial Commissioner allowed the appeal in respect of the first two charges and directed that the defence be called on the two charges (see *Public Prosecutor v. Hoo Chee Keong* [1997] 2 CLJ Supp 357; [1997] 4 MLJ 451). The appeal in respect of the third charge was dismissed. The accused then appealed against the decision of the learned Judicial Commissioner, which was subsequently dismissed by the Court of Appeal, with the direction that the defence be called (Mahkamah Rayuan Jenayah M-09-53-96, order dated 20 April 1998).

When the case was fixed for the hearing of the defence, Sessions Court judge, Tuan Mohd. Zaki bin Abdul Wahab had already gone on transfer to Kuala Lumpur and therefore, the defence was heard by his successor Tuan Rejandran Nayagam on 11 August 1998. The accused elected to give evidence on oath and also applied to re-call prosecution witness No. 13, which was allowed by the learned Sessions Court judge. At the end of the case for the defence, the accused was convicted and sentenced to six years imprisonment on the first charge and seven years imprisonment on the second charge. The learned Sessions Court judge ordered the sentences to run concurrently but granted a stay of the execution of sentence pending appeal against both conviction and sentence.

The offence under s. 474 of the Penal Code is committed by anyone who has in his possession:

i) any document,

ii) knowing the same to be forged and,

iii) intending the same shall be fraudulently or dishonestly used as genuine.

Now, as to which of the two maximum punishments provided under s. 474 of the Penal Code the said offence will carry, will then depend on whether the document in question is one which falls under s. 466 or s. 467 of the Penal Code. Documents falling within s. 466 are:

1) a document purporting to be a record or proceeding of or before a court;

2) a document purporting to be a record of a Register of Birth, Baptism, Marriage or Burial;

3) a document purporting to be a record of a Register kept by a public servant as such;

4) a document purporting to be a certificate or document purporting to be made by a public servant in his official capacity;

5) a document purporting to be an authority to institute or defend a suit or to take any proceeding therein or to confess judgment; and

6) a document purporting to be a power of attorney.

Documents coming within the ambit of s. 467 are:

1) a document which purports to be a valuable security;

2) a document which purports to be a will;

3) a document which purports to give an authority to adopt a son;

4) a document which purports to give authority to any person to make or transfer any valuable security;

5) a document which purports to give authority to any person to receive the principal, interest or dividend thereon;

6) a document which purports to give authority to any person to receive or deliver any money, movable property or valuable security;

7) any document purporting to be an acquittance or receipt acknowledging the payment of money; and

8) any document purporting to be an acquittance or receipt for the delivery of any movable property or valuable security.

The description of the credit cards as a valuable security in the charges does not render the charges in any way defective, null and void in the event the said credit cards are in fact and in law not a valuable security within the definition of s. 30 of the Penal Code provided the exhs. P3 and P4 came within the description of any of the documents listed in s. 466 or 467 of the Penal Code.

Failure to describe the documents accurately in the charge and/or failure to identify with precision as to which one or the other of the several documents listed in s. 466 or 467 of the Penal Code the prosecution is relying on for a charge under s. 474 of the Penal Code, is a mere irregularity curable under s. 422 of the Criminal Procedure Code, as no injustice would be occasioned to the accused by such neglect, failure or error on the part of the prosecution. What is important and crucial for a charge under s. 474 of the Penal Code is that the document, which is the subject matter of the charge, is a document within the definition of s. 29 of the Penal Code and is also any one of the several documents listed in s. 466 or s. 467 of the Penal Code.

I have examined exhs. P3 and P4 carefully. They purport to be Mastercard credit cards on the face of it. They fall within the definition of "document" under s. 29 of the Penal Code. The evidence of SP8, Cheng Ket Chun, Director of Mastercard International, Asia Pacific Region for Security and Risk Management, disclosed that the said cards were counterfeits. They were credit cards made to resemble the genuine. They were forged cards. SP8 also testified:

> Presentation of a credit card by a card holder at a point of sales ie, a merchant means that the merchant would provide goods and services to the card holder in return for the card holder charging his card at the point of sale either by manual means or a electronic means to the point of sale terminal.

> The acquiring bank who accepts this merchant guarantees payment to the merchant for the goods or service he had rendered to the card holder. The card holder by possessing the issuance bank credit card undertakes to pay the bank the charges he had made.

In the above circumstances, exhs. P3 and P4 clearly give authority to a merchant (who has an agreement with an acquiring bank) to deliver any movable property or render any services to the holder of the said cards. Even if exhs. P3 and P4 are not deemed valuable security, they certainly are documents which purport to give authority "to deliver any movable property" to some person and are, therefore, one of the many types of documents described and alluded to in s. 467 of the Penal Code.

It is not disputed by the defence that exhs. P3 and P4 are forged documents. The defence, however contends that the accused did not have any knowledge that they were forged and that the accused did not intend to use the cards fraudulently or dishonestly, as genuine.

Now, as a matter of law, knowledge and intention must of necessity be inferred from all the circumstances surrounding the case. When forged credit cards are found in the custody and control of the accused and are in fact recovered from his person, then the explanation offered by the accused for such custody and control is extremely crucial and critical to prove or disprove whether he had knowledge that they were forged and whether he did intend to use them as genuine (at his discretion whenever the occasion and circumstances permitted, perhaps in collusion with others).

Briefly, the evidence for the prosecution was that on 3 November 1994 at about 11.15pm a police party led by Chief Inspector Noraini bin Abdullah (SP4), acting on information received went to Seng Huat & Co., a petrol station at Jalan Laksamana Cheng Ho. There, he saw a Proton car bearing registration No. PCR 2393 approaching a petrol pump. A male Chinese alighted from the car and he arrested the male Chinese. A body search of the male Chinese and a search of the car was made and several items were seized. The said male Chinese was detained and upon information received that a friend of his would be coming to the petrol station, SP4 laid an ambush. In the meantime, together with the male Chinese, a pump attendant Yong Ee Min (SP2) was also arrested by SP4. The following morning at about 12.40am (on 4 November 1994), SP4 saw a Proton car bearing registration No. WBP 714 entering and stopping in the compound of the petrol station. The accused alighted from this car and faced the direction of the petrol pump. SP4 and his party immediately approached him and uttered, "Police'. He tried to run away but was arrested. The accused was then searched. From his identity card it was ascertained that his name was Hoo Chee Keong. The police recovered

from the accused's right shirt pocket three credit cards wrapped in tissue and a plastic packet. The three credit cards were marked as exhs. P3, P4 and P5 while the plastic packet and tissue was marked exh. P2. I have examined P2 carefully. It is in fact an opened and used packet of pocket facial tissues. I have also examined exhs. P3, P4 and P5 carefully. Exhibit P3 is in the name of P.T. Poon valid through 11/94, P4 is in the name of Mr. Tan Soon Meng valid from 01/92 until end of 02/95 and P5 is in the name of Wong Kah Meng valid through 05/94.

From the left shirt pocket of the accused four sales slips from another petrol station were recovered (exhs. P6A, B, C and D). Also recovered from the accused were personal items like keys, cash RM720, ball point pen, pager and a black wallet. The black wallet was found on the right back trouser pocket of the accused. Inside the wallet there were personal items, including a piece of paper on which was written eight series of numbers with eight associated signatures. The wallet was marked as exh. P7 and the piece of paper exh. P7A. SP4 also recovered from the left sun-shade visor of the car, from which the accused had alighted, a sheet of paper which had eight series of numbers and signatures associated with them. It was market exh. P8.

SP4 was never challenged on the discovery of any of the incriminating exhibits recovered on his person. The manner and circumstances in which the accused was arrested by SP4 that night was also never challenged in cross-examination. It was never suggested to SP4 that the accused was in fact only arrested when he emerged from the toilet at the petrol station and not as soon as he alighted from motorcar WBP 714. It was also never suggested to SP4 that the sales slips P6A-D were never found on the person of the accused.

In his defence on oath, the accused had testified that he had gone to Seng Huat Petrol Station on the day and time he was arrested in order to meet a friend to return the car WBP 714. The friend was one Ah Tan whom he had befriended about four days earlier in Johore Bharu. He came together with Ah Tan to Melaka and stayed in a house rented by the said Ah Tan. He did not know whether the car WBP 714 belonged to Ah Tan or whether Ah Tan had hired it. Nevertheless, according to the accused, Ah Tan had told him at about 7pm on 3 November 1994 to return the car to him at the said petrol station, and, that was why he had gone to the said petrol station that night. In his defence, the accused said he was arrested only when he came out of the toilet of the petrol station. He testified he did not go to the petrol station to fill the car with petrol.

The accused explained that he had seen the credit cards, exhs. P3, P4 and P5. He could feel the cards near the hand brake of the car. He took the cards, placed them in his pocket and then went to the toilet at the petrol station. He explained he didn't know to whom the cards belonged but, nevertheless, took the cards and kept them in his pocket because he thought they were important.

In his evidence in chief, the accused did not utter a word about exhs. P6A-D nor P7A which were found on his person by SP4. P6A-D, it will be re-called are sales slips in respect of transactions with credit cards carried out at another petrol station about two hours earlier, that is, between 10.27pm and 11.11pm exh. P7A, it will be re-called was found in the wallet of the accused. It had eight series of numbers and at least one of them namely "0393" corresponds to the last four digits of the card number shown in P6B, ie, "5191 4300 1224 0393".

Under cross-examination, the accused denied that exhs. P6A-D and P7A were found in his posession. This is definitely a blatant lie as the discovery from the person of the accused is not only supported by the testimony of SP4, but also corroborated by the search list P10 signed by the accused, as well as the failure of accused to challenge SP4 on the discovery of same on the person of the accused.

At the conclusion of the defence, the accused, had not cast any doubt that he was in possession of the forged credit cards in three different names. The three different names were never shown to be the accused's aliases. There was no evidence or reason given as to why he should be in custody and control of the three cards. The accused has not cast any doubt that he was in possession of four sales slips pertaining to credit card transactions at a different petrol station between 10.27pm and 11.11pm on 3 November 1994. The names patently identified in print on the four sales slips are:

1) Kan Ten (P6A)

2) No name (P6B)

3) Mr. Tan Soon Meng (P6C)

4) No name (P6D)

The accused never testified that the four sales slips had been given to him by Ah Tan or how he came to be in possession. His bare denial of being in possession does not help his defence.

Proof of possession of the three credit cards in three different names by the accused readily leads to the inference that the accused had knowledge that they were forged and had the intention to use them as genuine. The accused's defence that he had found the credit cards in the car and took them because they were important as he had seen Ah Tan use them does not, and cannot, create any doubt on the prosecution's case. If in fact it was true that the accused was going to return the car to Ah Tan by appointment at the petrol station, and if it was in fact true that the accused had seen Ah Tan use the credit cards, and if it is further true that the accused had found the cards near the hand brake of the car, just before he alighted from the car in order to go to the toilet, and if in fact it is also true he did not intend to use the cards as genuine, then, it defies imagination and common sense for the accused to remove the cards and place them in his pocket. The three credit cards were not souveniers for the accused to take and keep in his pocket!

The Sessions Court judge has considered the defence of the accused very carefully and has given his reasons as to why he did not believe the accused or why the defence has not cast any doubt in his mind. He has applied the correct principles enunciated in *Mat v. Public Prosecutor* [1963] 29 MLJ 263 in evaluating the defence.

Upon a consideration of all the evidence afresh I am entirely satisfied that the learned Sessions Court judge has come to the correct conclusion in finding the accused guilty on the two charges upon winch the accused was called upon to enter his defence. In the circumstances, the conviction on the two charges is upheld. However, with regard to the sentence of six years and seven years imprisonment on the first and second charges respectively, I am of the view that the learned Sessions Court judge has been unduly influenced by a Bank Negara report purportedly highlighted in the Sunday Mail dated 11 October 1998. The Bank Negara report was never produced in court as evidence and neither was the reporter of the said Sunday Mail called to testify. According to the learned Sessions Court judge, the report had stated that between June 1996 and until May 1998 there had been a total of 3005 cases of credit card fraud and the combined loss incurred by Visa International and Mastercard last year (1997) was RM40 million. I pause to observe that the offence committed by the accused was in 1994.

The offence committed by the accused is admittedly a serious offence. Nevertheless, as the accused is a first offender some consideration must be given to the possibility of rehabilitating him by not incacerating him for a very long period of time in prison.

No violence was used in this offence. The evidence adduced does not reveal that the accused has been involved in causing heavy financial loss to anyone by the use or intended use of the credit cards.

In the above circumstances, the sentence imposed by the learned Sessions Court judge is set aside and substituted with three years imprisonment on each of the two charges, the sentences to run concurrently.

Appeal dismissed.

Conviction upheld.

Sentence varied.

Stay of execution pending further appeal refused.